Thomas H. Roberts, d/b/a AC Electric and its alter ego Boyce Enterprises, Inc. and its successor ECM Enterprises, Inc., d/b/a Ace Electric *and* International Brotherhood of Electrical Workers Local Union 910, AFL–CIO. Case 3–CA–18504

April 17, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On March 30, 1998, Administrative Law Judge Robert T. Snyder issued the attached supplemental decision. Respondent ECM Enterprises, Inc., d/b/a Ace Electric (ECM) filed exceptions and a supporting brief. The General Counsel filed an answering brief. The General Counsel also filed exceptions and a supporting brief. Respondent ECM filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Supplemental Decision and Order. With a minor exception, we agree with the judge's analysis of the interrelationships among the three Respondents in this compliance specification case. We disagree, for the reasons that follow, with his division of their liability for unfair labor practices committed by one of them.

This case involves backpay owing to Randy Bashaw and Raymond Rothamel, whom Respondent Thomas H. Roberts, d/b/a AC Electric (AC) unlawfully refused to hire on November 4, 1993. At that time, Respondent AC was engaged in the electrical contracting business and was bound to the terms of a multiemployer contract with a predecessor of the Charging Party Union. Respondent AC ceased operations on December 31, 1993. The judge has found, in agreement with allegations of the specification, that Respondent Boyce Enterprises, Inc. (Boyce), which began electrical contracting operations on the next day, was AC's alter ego and/or AC's successor within the meaning of *Golden State Bottling Co. v. NLRB,* 414 U.S. 168 (1973), because Boyce took over and continued AC's operations with knowledge of AC's unfair labor practices.[3]

Respondent Boyce continued in existence throughout the remainder of this compliance specification's backpay period, which ends on May 1, 1996. Boyce ceased operations altogether in late August 1996. Until then, it remained bound to successive collective-bargaining agreements with the Union and its predecessor.

On March 25, 1996, Respondent ECM commenced electrical contracting operations, employing a majority of the Boyce work force and assuming many of the jobs started by AC/Boyce. The judge has found, again in accord with the allegations of the compliance specification, that ECM succeeded to the operations of Respondents AC and Boyce with knowledge of AC's unfair labor practices. He therefore found that Respondent ECM was also a *Golden State* successor.

Respondent ECM, however, was not bound to the terms of any collective-bargaining agreement with the Union, and it provided different wages and benefits than those in the contracts applicable to the bargaining unit of electricians of Respondents AC and Boyce. The judge acknowledged that generally a *Golden State* successor would share full joint and several liability for the predecessor's unfair labor practices. However, he found that there were "special and somewhat novel circumstances presented on this record" that warranted division of the backpay period and the imposition of different backpay obligations for the Respondents. He reasoned that Respondents AC and Boyce should share joint and several liability for reimbursement of wages and benefits to the two discriminatees at union contract rates for the entire backpay period of November 4, 1993, to May 1, 1996. On the other hand, the judge found both that Respondent ECM was only liable to the discriminatees for the brief part of the backpay period on and after the March 25, 1996 date when it commenced operations and that its liability was limited to reimbursement of wages and benefits at ECM's own, nonunion rates. (Respondents AC and Boyce shared joint and several liability with Respondent ECM in this regard, in addition to their separate liability for the entire backpay period.)

For the reasons stated by the judge, we agree that Respondents AC and Boyce are alter egos and/or wrongdoing predecessor and *Golden State* successor, and that, as such, they have full joint and several backpay liability to

[1] We find no need to pass on the judge's statement that Respondent ECM is foreclosed by Board Rule 102.54(b) from disputing the interim earnings of discriminatee Raymond Rothamel.

[2] Respondent ECM has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge also found that Respondents AC and Boyce were a single employer. We find no need to pass on this finding.

the discriminatees for the entire backpay period at the union contract rates set forth in the compliance specification (with certain uncontested modifications set forth in the judge's decision). We further agree that Respondent ECM is a *Golden State* successor, but we disagree with the judge's limitation of ECM's resulting backpay liability.[4]

In *Golden State*, the Supreme Court upheld the Board's remedial doctrine permitting the imposition of derivative liability on a bona fide successor employer who acquires and continues the business of a predecessor with knowledge of the predecessor's unremedied unfair labor practices.[5] This equitable doctrine involves a balancing of the legitimate interests of the bona fide successor, the public, and the employee victims of an unfair labor practice. The balancing process emphasizes the need for protection of those employees who may be "without meaningful remedy when title to the employing business operation changes hands." *Perma Vinyl*, 164 NLRB at 969. Their situation contrasts with that of a successor who, having advance notice of the predecessor's wrongdoing, may make arrangements for potential liability when negotiating the business transfer. *Golden State*, 414 U.S. at 185, citing *Perma Vinyl*, 164 NLRB at 969. Consequently, the general practice under the *Golden State* doctrine is to impose full joint and several liability on the predecessor and the successor.

As stated, the judge here acknowledged this general remedial practice under the *Golden State* doctrine, but he found that "special and somewhat novel circumstances" warranted the imposition of a more limited backpay obligation on Respondent ECM. The judge did not identify those circumstances, and we find that there are none.

With respect to the appropriate length of the backpay period for Respondent ECM, there is no precedent for limiting a successor's liability to the term of its existence. The relevant timeframe for purposes of computing backpay liability is the entire period in which the discriminatees would have worked but for the respondent employer's unlawful denial of employment. The imposition of joint and several liability for the entire period on both predecessor and successor, irrespective of their own actual periods of operation, best insures that the employee victims receive full compensation even if one or the other employing entity suffers insolvency or resists compliance. See *Golden State*, 414 U.S. at 186–187 (endorsing the Board's policy of imposing liability on a predecessor beyond the date it sold its business). The Board has routinely imposed this liability on a *Golden State* successor who comes into existence at some point during this backpay period. E.g., *AAA Fire Sprinkler, Inc.*, 322 NLRB 69 (1996) (Arlene); *Marbro Co.*, 310 NLRB 1145 (1993) (RMS); and *Bell Co.*, 243 NLRB 977 (1979) (Endurall). We shall continue to do so in this case.

Turning now to the appropriate basis for computing Respondent EMS' liability, we emphasize that the imposition of *Golden State* liability for backpay does not rely on the successor's obligation to assume the predecessor's contractual obligations to a union,[6] to adhere to the predecessor's terms and conditions of employment,[7] or even to recognize and bargain with the union that represented the predecessor's employees.[8] Requiring Respondent ECM to compensate the discriminatees on the basis of monetary terms in a collective-bargaining agreement is not tantamount to requiring it to assume the contract.

The real question here is whether the General Counsel's reliance on the union contract terms sets a reasonable standard for determining gross backpay, restoring to the discriminatees as nearly as possible what they may reasonably be said to have lost as a consequence of the discrimination against them. In that regard, it is undisputed that the discriminatees applied for, and were unlawfully denied electrician jobs with Respondent AC on November 4, 1993. From that date, throughout the entire backpay period ending on May 1, 1996, and continuing until August 23, 1996, Respondent AC or its alter ego/*Golden State* successor, Respondent Boyce, remained in operation and obligated to pay its electricians according to the terms of successive union contracts. Although Respondent ECM began operations on March 25, 1996, employing some AC/Boyce employees on and after that date under different terms and conditions of employment, it has failed to show that Bashaw and Rothamel necessarily would have been among those employees who left AC/Boyce and joined its work force at any time prior to the end of the backpay period. We therefore find that the General Counsel's use of the union contract terms as the standard for computing all Respondents' backpay liability, including that of Respondent ECM as a *Golden State* successor, was reasonable for the entire backpay period at issue.[9]

[4] Independent of the backpay issue addressed here, Respondent ECM bears the remedial obligation to offer immediate employment to Bashaw and Rothamel.

[5] See *Perma Vinyl Corp.*, 164 NLRB 968 (1967), enfd. sub nom. *U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

[6] *Golden State*, 414 U.S. at 183–185.

[7] *NLRB v. Burns Security Services*, 406 U.S. 272, 281 (1972).

[8] *St. Marys Foundry Co.*, 284 NLRB 221, 221 fn. 4 (1987), enfd. 860 F.2d 679 (6th Cir. 1988).

[9] We need not decide here the appropriate standard for computing liability, if any, after Boyce ceased operations.

ORDER

1. The National Labor Relations Board orders that the Respondents, Thomas H. Roberts, d/b/a AC Electric and its alter ego Boyce Enterprises, Inc., their officers, agents, successors, and assigns, shall, jointly and severally with their successor, Respondent ECM, Enterprises, Inc., d/b/a Ace Electric, its officers, agents, successors, and assigns, make whole the discriminatees Randy Bashaw and Raymond Rothamel, by paying to each of them, for the period November 4, 1993, to May 1, 1996, the amounts of backpay appearing for each of them in each quarterly backpay report attached to and made part of the amended compliance specification, with interest accrued thereon to date of payment, minus the tax and withholding required by Federal and state Law, and will pay to each of the entities described in paragraph 37 of the amended compliance specification on behalf of the two named discriminatees the amounts specified opposite the name of each entity, including the IBEW Health and Welfare Fund, IBEW Pension Fund, IBEW Annuity Tier A and National Electrical Benefit Fund (NEB), except that no payment shall be made to the IBEW Apprenticeship Fund and to IBEW Local Union 910, AFL–CIO, representing working dues and assessments, and quarterly dues as described in paragraph 34 of the amended compliance specification.

2. Backpay and loss of benefits shall continue to accrue for, and on behalf of Randy Bashaw and Raymond Rothamel until such time as Respondent ECM, d/b/a Ace Electric makes a valid offer of reinstatement to them.

Robert A. Ellison, Esq., for the General Counsel.
Thomas H. Roberts, appearing pro se.
Karen Roberts, President, for Boyce Enterprises, Inc.
Thomas H. Sommers, Esq. (Hoff, Curtis, Pacht, Cassidy & Frame, P.C.), for ECM Enterprises, Inc., d/b/a Ace Electric.[1]
Donald D. Oliver, Esq. *(Blittman & King, LLP*), for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

ROBERT T. SNYDER, Administrative Law Judge. In an order dated May 31, 1995, in the absence of exceptions having been filed, the General Counsel, having successfully requested withdrawal of its exceptions to a decision of Administrative Law Judge George F. McInerny, issued on April 26, 1995, the Board adopted the findings and conclusions of the administrative law judge as contained in his decision, as corrected, and ordered the Respondent, Thomas H. Roberts, d/b/a AC Electric (Roberts, AC, or AC Electric), its officers, agents, successors, and assigns, to take the action set forth in the recommended Order of the administrative law judge.

In the complaint in the underlying proceeding, Roberts was alleged to have violated Section 8(a)(1) of the Act by interrogating prospective employees—the two alleged discriminatees—about their union activities and membership and to have violated Section 8(a)(1) and (3) of the Act by conditioning job offers on prospective employees giving up their union membership and by refusing to hire two prospective employees because they were members of a union, in this case the Charging Union, International Brotherhood of Electrical Workers, Local Union 910, AFL–CIO (the Union or Local Union 910).

The Union did not file, nor did the parties litigate, any allegation that Roberts refused to bargain in good faith with the Union in violation of Section 8(a)((1) and (5) of the Act, although Judge McInerny found that Roberts had signed a letter of assent in 1990 binding himself, as an electrical contractor, to abide by the collective-bargaining agreement between a predecessor of the Union, Local Union 781, which had since merged into Local Union 910, and electrical contractors. At the time of his decision, litigation was pending in Federal district court as to whether Roberts continued to be bound by the letter of assent and whether all union grievance proceedings should be stayed at his request.

Judge McInerny concluded that Roberts had violated the Act as alleged, and recommended an order, adopted by the Board, which, inter alia, required Roberts to offer to Randy Bashaw and Raymond Rothamel, the two union member applicants discriminatorily denied employment, immediate employment, and to make them whole for any loss of earnings either may have suffered.

Judge McInerny found Roberts unlawfully refused to hire Bashaw and Rothamel on or about November 4, 1993. In his remedy, adopted by the Board, he ordered Roberts to offer the two immediate employment at rates commensurate with their experience under the current collective-bargaining agreement in effect between the Union and the appropriate division and chapter of the National Electrical Contractors' Association (NECA) and to make them whole for any loss of earnings they may have suffered by reason of Roberts' unlawful conduct toward them, in accordance with the usual Board make-whole remedy, by paying each of them a sum of money equal to the amount he would have earned from the date of the unlawful refusal to hire them to the date they are offered employment, less net earnings during such period, to be computed in the manner established by the Board in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In his decision in the underlying proceeding, Judge McInerny declined to find Boyce, owned and operated by Roberts' wife, Karen Roberts, an alter ego and successor to Roberts, in the light of uncontroverted testimony of his transfer and sale of assets and property of his business to her at the end of 1993, and her continuation of the same business under facts which might well justify such legal conclusions, in the absence of any

[1] Both Boyce Enterprises, Inc. (Boyce) and ECM Enterprises, Inc., d/b/a Ace Electric (ECM, Ace, or Ace Electric) have been added as Respondents solely in this supplemental proceeding in order to add them as parties allegedly responsible for complying with the Board's Order, as enforced.

notice to Karen Roberts as the alleged principal of Boyce or the opportunity for her to be heard, and where the complaint was not amended to allege Boyce as having such status.

Subsequently, upon the application of the Board for summary entry of a judgment against Roberts, its officers, agents, successors, and assigns, enforcing its Order dated May 31, 1995, the U.S. Court of Appeals for the Second Circuit entered judgment enforcing the Order of the Board dated May 31, 1995.

The Backpay Specification, Answers Thereto, and Resulting Issues for Determination

The Regional Regional Director for Region 3 (Regional Director) issued an amended compliance specification dated December 11, 1996. In it, for the first time the Regional Regional Director names Ace Electric as a party Respondent responsible, jointly and severally with AC and/or Boyce,[2] for compliance with the Board's Order and the court's judgment, as a successor with notice of AC's and/or Boyce's actual liability to remedy its unfair labor practices.

The specification recites that AC having failed and refused to comply, and a controversy having arisen over the obligation of Boyce and Ace to satisfy the make-whole provisions of the Board's Order, the Regional Director issued this amended specification pursuant to Sections 102.54 and 102.55 of the Board's Rules and Regulations.

In the amended specification the Regional Director alleges that since May 31, 1995, AC has not taken any actions required of it by the Board's Order and the court's judgment. AC did not file any answer so does not deny this allegation.

After making various factual allegations, which, taken together, the Regional Director alleges, support her conclusion that Boyce has continued AC's business as an alter ego, the specification seeks to hold Boyce jointly and severally liable with AC for compliance.

In an unsworn answer dated August 13, 1996, which Karen Roberts filed as president of Boyce, she claims that on December 31, 1993, Thomas Roberts instructed his attorney to file a discontinuance of business and on that date, was in fact, out of business and that Boyce did not commence operations until January 2, 1994. While the amended specification alleged that at various time since January 1, 1994, Boyce employed Thomas Roberts, Boyce by Karen Roberts, his wife, asserts in the answer that he is no longer employed by Boyce and has not been for quite some time.

Boyce, in its answer, did not dispute or deny certain allegations in the amended specification. These include the allegation that at all material times, both AC's and Boyce's offices and place of business were located at 248 Allen Road, Plattsburgh, New York. This address was later established as the common residence of Thomas and Karen Roberts.

Neither did Boyce deny the allegation that on December 31, 1993, Thomas Roberts transferred all of the assets and property he held as the sole proprietor of AC to his wife, Karen Roberts (nee Boyce), who, in turn, created Boyce Enterprises, Inc. Boyce also did not deny that since January 1, 1994, Karen Roberts has been its sole owner and president; that Boyce employed the same four employees that AC had employed since 1991 until December 31, 1993; that since January 31, 1994, Boyce used the same electrical equipment and four vehicles previously used by AC at various times during the same period; and finally, that at all material times since January 1, 1994, Boyce has held AC Electric out to the public as a division of Boyce.

As to the successor issue, the specification alleges and Ace Electric filed answer admitting that it commenced operations as an electrical contractor on or about March 25, 1996. By its answer Ace Electric also admits that Edmond A. Martin (Martin) was office manager and estimator for Conroy & Conroy, a general contractor, and in that capacity had contact with numerous subcontractors including Thomas Roberts, AC, and/or Boyce. It further admits that Thomas Roberts became an employee of Conroy & Conroy in the summer of 1995 and that Martin and Roberts continued to have contact from time to time as coemployees. In its answer Ace Electric also admits that Thomas Roberts[3] is employed as its operations manager (but specifically denies that Roberts has overall responsibilities for day-to-day operations and implementation of labor relations policies).

With respect to backpay, the specification alleges that the backpay period for the two discriminatees, Bashaw and Rothamel, begins on November 4, 1993, and continues to date, inasmuch as no valid offer of reinstatement has been made by AC, Boyce, or Ace. As earlier noted, neither AC nor Boyce denies this allegation, while Ace denies it by virtue of lack of information to form a belief as its truth or falsity.

As to all further backpay allegations, neither AC nor Boyce denies them, but Ace denies specific elements of the formula used to establish gross backpay on the basis of lack of sufficient information to form a belief, and further, denies allegations that it is a successor to AC and/or Boyce or subject to the jurisdiction of the Board.

In her backpay calculations, the Regional Director notes that the amounts claimed are based on records provided to the Regional Office by Thomas Roberts that are dated November 4, 1993, through May 1, 1996. Therefore, the amounts owing are as of May 1, 1996, although in the absence of a valid offer of reinstatement to the discriminatees, backpay and loss of benefits continue to accrue.

The Regional Director alleges that an appropriate measure of calendar quarter gross backpay owing to Bashaw and Rothamel is based on the average hours worked by those employees who worked during the backpay period, excluding four named core employees who were employed by AC long before the two discriminatees were denied employment in November 1993, multiplied by the discriminatees' respective hourly wage rate. The specification then claims that for those weeks during the backpay period when only one employee worked, the hours worked have been equally divided between the two discriminatees.

The specification next alleges the respective hourly wage for each discriminatee, claiming for Bashaw $15.32 from Novem-

[2] Boyce had been named as AC's alter ego in both the original and amended specification.

[3] Misspelled Andrews in par. 18 of its answer.

ber 4, 1993, until April 1, 1995, when he became a journeymen and would have earned $19.15 an hour, and claiming the journeyman rate of $19.15 throughout the backpay period for Rothamel. These rates are alleged as commensurate with the discriminatees' experience under the collective-bargaining agreements between the Union and NECA. The specification also adds remuneration for each discriminatee representing overtime pay at 1-1/2 times regular pay for overtime hours worked by the employees employed other than the four named.

The specification schedules itemize the quarterly gross backpay and then computes the quarterly net backpay by deducting net interim earnings for each discriminatee. The interim employers and earnings and the computation of the net resulting figures are set forth in schedules.

In addition to alleged lost pay, the specification seeks recovery of fund contributions on behalf of the discriminatees. The Regional Director's theory for seeking these sums, to be paid to the respective funds on behalf of the discriminatees, is that Thomas Roberts, his alter ego Boyce, as well as his successor Ace Electric, have never timely withdrawn their bargaining authority from NECA, and NECA and the Union have negotiated two collective-bargaining agreements relevant to obligations of signatories, their agents and successors, requiring covered employers to make such payments. These two agreements were effective April 1, 1993, to March 31, 1995, and April 1, 1995, to March 31, 1997.

The agreements cited provide for the member employers of the NECA, as well as signatory employers who adopt and agree to be bound by the agreement, to make payments to various union funds, including a Health and Welfare Fund, Pension Fund, Annuity Fund, National Electrical Benefit Fund (NEBF), and Apprenticeship Fund, among others, each of which provide for contributions to be made of varying percentages of the covered employer's gross monthly labor payroll. While described as union funds in the specification, these funds, in actuality, are trust funds, jointly administered by the Union (or in the case of the NEBF its parent, the IBEW) and employers under trust agreements and pursuant to Section 302 of the Labor Management Relations Act of 1947.

In addition to contributions to the cited funds, the specification also seeks payments of moneys in the form of working dues (assessments), described in the agreements at Section 309 as "the additional working dues," which the covered employer agrees to deduct and forward to the financial secretary of the Local Union—upon receipt of a voluntary written authorization—from the pay of each IBEW member, the amount being the amount specified in the approved Local Union bylaws. The percentage of pay to be deducted varies between 4.5 and 5.0 percent in the two agreements.

Finally, the specification also demands that "Respondents must make whole IBEW Local 910 for the quarterly dues it lost during the life of the collective-bargaining agreements as a result of Respondents' unfair labor practices."

As to union dues, both working dues and assessments as well as quarterly union dues paid directly by members to Local Union 910, the specification alleges that there shall be no offset from the amounts owing to the Union by what the discriminatees remitted (or presumably what working dues were remitted on their behalf) during the backpay period while employed by their interim employers. The Regional Director asserts here that the Union would have received dues from others who would have worked in their place for interim employers, but still lost moneys by virtue of the discriminatees' not having been hired by Respondents.

An appropriate measure of net amounts owed on behalf of the two discriminatees to the Health and Welfare, Pension and Annuity Funds is claimed to be the gross number of hours for which Respondents owe these funds on their behalf offset by the number of hours each discriminatee's interim employer contributed to these funds on their behalf. Each overtime hour is equal to 1 hour for purposes of calculating fund contributions. The net number of hours is then multiplied by the applicable rate for each fund to reach the net amount of contributions owing to these specific funds.

An appropriate measure of the amounts owing to the NEBF, Apprenticeship Fund and Working Dues (Assessment)/General Fund on behalf of the discriminatees is claimed to be the gross amount of what their earnings would have been had they been employed by Respondent, multiplied by the applicable percentage set forth for each of these funds in the collective-bargaining agreements previously referenced.

In addition to the foregoing, including the quarterly dues the Union lost during the life of the collective-bargaining agreements, the specification relies on article IX, section 9.09 of the agreements binding Respondent to their terms, as well as declaration of trusts, and the rules and regulations including collections policies, of the funds, in seeking interest on delinquent payments to the Pension Fund and the Annuity Fund in the amount of l.5 percent for each month following the month for which contributions were required, and liquidated damages in the amount of 10 percent of the unpaid contributions.

With respect to the allegations that it is obligated to make contributions to the various funds, Ace Electric denies that it is bound by any collective-bargaining agreement entered into between NECA and the Union and denies any obligation to contribute to any union fund. Ace further denies it is bound by any agreement or declaration of trust or rules, regulations, or policies of the funds. Ace also denies that the Union is entitled to any dues during any period when it was not acting as the exclusive bargaining representative for the alleged discriminatees.

The Evidence Adduced in Support of the Amended Specification

Initially, counsel for the General Counsel moved, successfully, to allege Boyce, to the extent it is not found to be AC's alter ego, is a successor to or single employer with AC.

The collective-bargaining agreements introduced into evidence show the parties to be Local Union 910 and The St. Lawrence Valley Electrical Contractors Association, Inc., a division of Albany Chapter of NECA. It is these agreements, in effect for the time periods previously described, upon which the Regional Director relies to establish both the salaries and fringe benefits and other benefits to which the discriminatees, and the funds, on their behalf, are claimed to be entitled in this proceeding.

Compliance Officer Richard Friend of Region 3 of the Board, testified that, having received the answers to the amended specification, neither of them raise any specific questions or objections to the manner of his computations, i.e,. the gross backpay formula selected and applied, or the amount of the calculations. Friend also indicated that to his knowledge none of the named Respondents had offered reinstatement to the named discriminatees since the issuance of the Board Order in the underlying proceeding.

On his cross-examination, Friend was compelled to acknowledge that the make-whole remedy of the Board fails to make any reference to union dues, or require payment of union dues, and, indeed, the remedy is directed toward the discriminatees, and not to the Charging Party, the Local Union.

Friend noted that while the remedy does not specifically address or require fund contributions, he implied such a general make-whole remedy would include undertakings regarding losses in fringe benefits, such as pensions, health benefits, and annuities.

Friend also agreed that with respect to certain quarters of the year covered by the backpay period, the specification provided no credit to Respondents for earnings by Bashaw which exceeded his alleged gross backpay in those quarters. The specification, of course, made no claims for Bashaw for those quarters, under the prevailing case law governing the manner of computation and calculation of gross backpay by quarters. See *F.W. Woolworth Co.*, 90 NLRB 289 (1950).

When asked on redirect examination about the reason for the inclusion of union dues in the specification, Friend referred to an investigation of the collective-bargaining agreement but offered no basis or theory to support their inclusion. The undersigned then requested counsel for the General Counsel to support the inclusion of dues and the funds in the specification, in the absence of specific language in the Board's Order, by citation at the appropriate time.

Counsel for the General Counsel introduced into evidence various documents supporting its theory that Thomas Roberts had bound himself to abide by the union agreements. By signing a letter of assert on June 19, 1990, as owner of AC Electric, Thomas Roberts authorized the Plattsburgh division of the Albany Chapter NECA (NECA) as its collective-bargaining representative for all matters contained in or pertaining to the current and any subsequent approved inside labor agreement between the NECA and Local Union 781, IBEW.[4]

Although Thomas Roberts attempted to withdraw from his union agreement and relationship by a letter of December 2, 1992, addressed to the Union's predecessor, Local Union 781, that action proved ineffective because made improperly and untimely under his letter of assent, which required such notice to be made to both the NECA and to the Local Union and at least 150 days prior to the then-current anniversary date of the applicable approved labor agreement. A notice to be effective would have had to be made to both parties at least 150 days prior to March 31, 1993, the anniversary date of the then-current agreement, and this notice did not meet that requirement.[5]

At a labor-management committee meeting held on December 29, 1993, between Local Union 910 and NECA representatives to which Thomas Roberts had been invited, but at which Karen Roberts appeared instead, a major portion of the meeting was devoted to AC Electric's failure to comply with the wage and fringe benefit provisions of the labor agreement. In the minutes of the meeting, Karen Roberts is listed as representing AC Electric. The labor-management committee with three union and three employers representatives, is convened under terms of the inside construction agreement to hear all unresolved grievances. The minutes reflect Karen Roberts' participation to the extent of asking a question and receiving an answer as to the inapplicability to AC Electric's situation of a provision in the agreement permitting either party to provide written notice of a desire to change or terminate the agreement on 90 days' notice.

At the conclusion of an executive session of the committee, it rendered a decision finding AC Electric had never timely terminated its signed agreement, now with Local 910, and that AC Electric was in violation of its letter of assent and several, enumerated, articles of the inside construction agreement.

In a letter dated December 31, 1993, Local Union 910 informed Thomas Roberts of the decision and enclosed a copy. In the letter, Roberts was informed of the possible moneys he owed to the Union and invited to seek a meeting with the writer, Union Business Manager George Intschert, failing which the Union would proceed with all legal means to effectuate collection.

Because at one point the Union believed it would be able to resolve its dispute with Thomas Roberts, the Union withdrew its initial unfair labor practice charge filed on November 12, 1993. The withdrawal request was approved by the then Regional Director for Region 3 by notice to Roberts dated December 14, 1993. However, there was no response from Roberts to the joint labor-management committee decision, further efforts to resolve the dispute were unsuccessful and the Union refiled its charge on April 6, 1994, alleging the conduct which resulted in the underlying Board Order and court summary judgment.

As noted, sometime in 1994 Thomas Roberts filed a complaint in Federal District Court for the Northern District of New York, in which he sought a declaratory judgment that no contractual relationship existed between him and Local 910, and for punitive and compensatory damages. In a nine-page decision read into the record, Thomas J. McAvoy, chief judge of

[4] Other evidence has established that Local Union 910 became the successor to Local Union 781 when it merged with and became a part of Local Union 910 sometime in late 1992 or early 1993 before the agreements in evidence were executed. Thomas Roberts' later defense, asserted in a Federal Court proceeding which resolved the issue of Roberts' contractual relationship with Local Union 910 adversely to him, that the merger removed any obligation by Roberts to bargain with Local Union 910, was soundly rejected by the district court, and affirmed on appeal of a grant of a Motion for Summary Judgment in favor of Local Union 910, *AC Electric v. Electrical Workers Local 910*, No. 94–CV–963, transcript of hearing (N.D.N.Y. 1995); affd. mem. 89 F.3d 826 (2d Cir. 1995).

[5] There is no evidence that Thomas Roberts, Boyce, or Ace ever provided a timely and appropriate notice of withdrawal thereafter.

the U.S. District Court, granted Local 910's Motion for Summary Judgment and denied Roberts' cross-motion for the same relief. The court found a valid and binding collective-bargaining agreement existed between Thomas Roberts, d/b/a A.C. Electric and defendant Local 910. Plaintiff was directed that he is bound to submit to the grievance procedure contained in the inside labor agreement, including participation in future labor-management committee to arrive at its full and final adjustment of the grievance.

On Roberts' appeal, as earlier noted, the U.S. Court of Appeals for the Second Circuit, affirmed the district court's grant of the Union's Motion for Summary Judgment.

Counsel for the General Counsel offered into evidence excerpts from Plattsburgh area NYNEX telephone company directories showing commercial and business listings for the periods August 1995 to July 1996 and August 1996 to July 1997. The earlier listings show Thomas Roberts with his business address as 248 Allen Road, Plattsburgh and business telephone as 561–1705. There is no business listing for Boyce Enterprises, Inc. The listings for the same period contain one for AC Electric at the same address, 248 Allen Road, Plattsburgh and the telephone number 561–216l. This address is the Roberts' home residence. This listing is for a period after Thomas Roberts, d/b/a AC Electric ceased all operations and was succeeded by Boyce Enterprises, owed by his wife Karen. A good size display advertisement in this directory lists AC Electric Division of Boyce Enterprises, Inc. as a professional electrical contractor for commercial, industrial, and residential, specializing in industrial motor controls with a picture of an electrician testing or applying a tool to an electrical control panel. The telephone number listed is 561–4644.

For the year August 1996 to July 1997 the telephone listing for AC Electric continues with the same address and telephone numbers, including a toll free 800 number listing. A large display ad in this directory shows ACE Electric as a professional electrical contractor for industrial and commercial, listing a p.o. box no. in Plattsburgh and a telephone number 561–7923. The same page also includes a listing for AC Electric, for industrial, commercial, and residential with a telephone number the same as the prior year for AC Electric, 561–2161. Immediately following AC Electric's business listing is one for ACE Electric listing its business address as 248 Allen Road, Plattsburgh, which is the Roberts' home residence and the continued business address for AC Electric in the prior year and this year's 1996–1997 business telephone directory. Thomas Roberts continues to be listed in the business listings at his home address and the same telephone listing, 561–1705, as in the prior year's white business listings.

As to union dues, Thomas Millea, assistant business manager for the Union, testified that union members pay two types of dues. One is a working assessment provided for as noted in the collective-bargaining agreement which is deducted from an assenting member's gross pay per week and forwarded to the Union, at the rate of 4-1/2 percent of gross pay. The other is union dues paid directly by the member to the International Union in Washington, D.C. It is paid quarterly or annually. The current rate is $61.50 per quarter for an apprentice, and $67.50 per quarter for a journeyman. The obligation to pay union dues continues whether or not members are employed.

During a cross-examination of Millea conducted by Thomas Roberts, Millea acknowledged that he had been aware that a nonunion employee, Joseph Dufrane, had worked for AC Electric for same 11 months after Thomas Roberts signed the letter of assent. During that time Millea had approached Roberts about Dufrane's employment, someone who had been employed outside the Union's exclusive referral procedure (art. IV of agreement) informing Roberts that should he retain Dufrane on his payroll he would be eligible for union membership, and placement in the Union's apprenticeship training program, but otherwise would have to be terminated, but that Roberts, who rated Dufrane as more of an apprentice than journeyman, wasn't sure he wanted to keep him as an employee. On other occasions, Millea testified he met with Roberts on several different jobsites informing him that his actions were in violation of the working agreement.

During Millea's cross-examination by counsel for Ace Electric, it became clear, if it had not been made clear previously, that Thomas Roberts, in executing the Union's letter of assent, authorizing the local chapter of NECA to represent Ace in collective bargaining with the union's predecessor, binding Roberts to the terms and conditions of the current and all subsequent agreements entered between the parties, unless and until such authorization was timely terminated, did *not* agree that the union was the majority representative of his employees. The agreement Roberts adopted was an 8(f) agreement under the Act, covering employees in the building and construction industry. Under the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1987), cert denied sub nom. *Deklewa v. NLRB*, 488 U.S. 889 (1988), a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3). And an employer that did not individually agree to a prehire agreement may nonetheless be bound to the terms of such an agreement as a result of multiemployer bargaining. *City Electric*, 288 NLRB 443 (1988).

What has been said so far shows the binding nature of the agreement in establishing the make-whole obligations of Thomas Roberts toward the two discriminatees, even in the absence of a refusal to bargain allegation in this case, and it governs the obligations as well by Boyce, if it is established as AC Electric's alter ego. Whether these contractual obligations govern any remedy against Ace Electric, assuming it to be a successor, with knowledge of Thomas Roberts' unfair labor practice, is a separate issue which will be explored and determined, infra.

Thomas Roberts testified under subpoena as a witness called by counsel for the General Counsel. By letter dated December 26, 1993, addressed to C. J. Madonna, attorney for Boyce Enterprises, he informed Madonna that "as of 12/31/93, I, Thomas H. Roberts, currently doing business as AC Electric, will no longer be in business. I have decided that there are just too many headaches and I have decided to fold my business." Roberts denied that his problems with the IBEW were serious ones but acknowledged he did have some problems with the Union.

In the letter, Thomas Roberts authorized Boyce to collect $47,226.01, representing his accounts receivables, and to pay out of that sum the accounts payable he then itemized due various electric and related supply companies totaling $44,306. Boyce collected this sum and made the payments due.

The letter goes on to indicate that Thomas Roberts relinquished his rights to Boyce regarding four vehicles he owned at the time for use in his business in return for his receiving $3000. for his interest in those vehicles. The vehicles consisted of a 1988 Dodge van, a 1990 Chevrolet van, a 1993 Chevrolet van, and a 1994 Chevrolet van. He had paid $15,000 for the 1994 Chevrolet van, most of which was financed. The down payment had been $1000. Boyce, after purchase, continued to make payments on the van. He had paid $1000 down on the 1993 van. The 1990 van "might have been" then owed free and clear. Thomas Roberts had paid $10,000 or $11,000 on its purchase. He had also paid $10,000 for the Dodge van. All four had been purchased new from dealers.

In the letter, Thomas Roberts then asks that every effort be made to collect and distribute the moneys and to forward to him a balance of $5919. This represents $3000 for the vans plus $2919 for the difference between accounts receivable and payable. He did receive the balance in full plus some additional monies representing a late payment.

Thomas Roberts produced three canceled checks from Boyce to himself representing these payments to him. One was for $1000, another was for $1440 and the third was for $4000. Roberts explained that this sum represented the equity he had in the business, including $3000 for the trucks and the balance of $2919, representing the difference between accounts receivable and accounts payable. The checks, dated June 3 and 8 and September 28, 1994, respectively, were draw on a bank account, printed in the name of "Boyce Enterprises, Incorporated, d/b/a A.C. Electric."

After ceasing to do business on December 31, 1993, Thomas Robert testified he became employed by Boyce when it commenced business on January 2, 1994, estimating and supervising. These were the same duties and responsibilities he performed when he was the proprietor of AC Electric.

Roberts explained that his wife answered the telephone when he had operated AC Electric but that after Boyce began operating, she ran the company on a day-to-day basis and did the hiring and firing. However, Roberts said that he and Jim Gill, an employee of AC Electric who went to work for Boyce, were responsible for supervising the employees and that his wife, Karen Roberts, had no prior experience in the electrical contracting business. Roberts received a salary as did his wife as president while the electrical employees were paid on an hourly basis.

As of December 31, 1993, AC Electric had four or five big jobs still in progress. After December 31, 1993, Boyce performed those jobs and he worked on some of them. For the most part, the employees who had been employed by AC Electric also worked in these jobs for Boyce. When AC Electric ceased operations it had seven employers and all of them were then placed on the Boyce payroll as of January 2, 1994.

Thomas Roberts left Boyce's employ in March or April, 1995 because of disputes with his wife over business matters which were interfering with personal matters. He then became employed by Conroy and Conroy (Conroy), an electrical contractor which had been a major customer of both AC Electric and Boyce. Conroy had supplied AC Electric with 35 percent of its electrical work as a subcontractor and had supplied Boyce with 50 percent of its electrical work.

In starting to work for Conroy as an electrician, Thomas Roberts accepted an offer from a Conroy owner, Will Conroy, who had been after him for a couple of years to work for him. Roberts continued in Conroy's employ as its sole electrician from May until February 1995. During this period Conroy continued to subcontract to Boyce and Roberts had occasion to work alongside Boyce electricians on a couple of occasions.

Thomas Roberts had known Edmond Martin since 1992. Martin was and is Conroy's estimator and works in the Conroy office. Roberts dealt with Martin while operating his own business, AC Electric, and while supervising employees at Boyce. Roberts submitted bids and estimates on behalf of both AC Electric and Boyce to Martin between a third and half the time and the rest of the time he dealt with Will Conroy.

Thomas Roberts testified he had been in touch with Martin on business matters, personally or by phone, once every couple of weeks and considered himself a personal friend and acquaintance of Martin.

Starting in December 1995 and continuing during January and February 1996, the work Roberts had been doing for Conroy became less and his hours were being cut back. At this point, Ed Martin approached him and asked if he was interested in going into a partnership with him, but Roberts declined. Sometime later Martin told him "I could set this business up and I could run it and I could do all the paperwork and taxes and payroll and books and all this crap, and essentially the things that I didn't—didn't like to do and never enjoyed about the business so eventually I caved in and said 'well, you know, I'm losing hours here and I need money to—to support the wife and kids.'" (Tr. 104.) I understood Roberts' testimony here to describe an understanding between himself and Martin pursuant to which Martin would perform all bookkeeping, billing, payroll and related office functions and Roberts would manage and operate the electrical subcontracting jobs which the new business was able to generate.

The new business, Ace Electric, started operations at the end of March 1996. Roberts acknowledged he was to run the operation outside the office as a kind of manager, supervisor, or jack of all trades, and he has continued in that capacity to the present, or at last through the close of hearing.

A joint exhibit stipulated into evidence, headed "Employee Time Lines" shows that of nine employees employed by AC Electric, including its owner, Thomas Roberts, until it ceased operations on December 31, 1993, seven became employed by Boyce at its inception on January 1 or 2, 1994, and that in addition to these seven, Boyce employed six others during all or part of the period of its operation, which ceased in late August 1996. Among the six others, were Karen Roberts, its owner and Thomas Roberts' wife, and Thomas Roberts Jr., the Roberts' son. This exhibit further shows that Ace Electric employed nine electricians from its startup on March 26, 1996, to close of hearing and that six of them had been previously em-

ployed by Boyce , and of these six, five of them, excluding only Thomas Roberts, had remained employed by Boyce into 1996, with their last employment dates for Boyce varying between late January and August. There was also no substantial hiatus between their employment, with four of the five showing their starting employment with Ace within a week of leaving Boyce. The fifth, Randy Trudeau, had been laid off by Boyce on January 26, 1996, before starting with Ace on April 5 of that year shortly after its start up date. These six had commenced work for Ace Electric between March 1996, when it began operations, and August, 1996 when the last of them, Eric Harvey, had finished up work for Boyce. Others started in April and May, when Ace Electric started to obtain contracting work requiring more than one electrician.

Among the six electricians Ace hired who had previously been employed by Boyce, Roberts successfully recommended to Martin the employment of three of them, Randy Trudeau, Russ Lester, and Eric Harvey, and may have recruited a fourth, James Boyce. In two instances, Roberts successfully hired them away from Boyce with promises of health benefits made at the suggestion of Martin.

Roberts testified that after leaving Boyce, he was no longer involved in supervising Boyce's electricians.

As for Ace Electric, Martin is its president and sole shareholder. Ace does business under the name of Ace Electric in order to obtain favorable alphabetical placement in the phone directory and also to take advantage of the reputation AC Electric had built up. Recall Ace's business directory listing showing Roberts' resident address as its business address.

Ace primarily engages in commercial electrical work, mostly as a subcontractor for Conroy. Ace obtains this work by submitting bid proposals to Conroy which in the past have been reviewed by Martin in the course of his employment with Conroy and are ultimately approved by Will Conroy.

When Ace started its operations, Martin purchased a brand new van to be used by Ace in its business from a car dealership for $18,139.34 and registered the van in the name of ECM Enterprises, Inc. Thereafter Ace purchased three other vehicles from Boyce for fair market value in an arms length transaction. On March 26, 1996, Boyce sold a 1990 Chevrolet cargo van to Ace for $1800. On May 21, 1996, Boyce sold a 1993 Chevrolet cargo van to Ace for $7300. On September 17, 1996, Boyce sold a 1994 Chevrolet cargo van to Ace for $10,000.[6]

As an employee of Ace, Tom Roberts does field supervision; he lays out jobs on the jobsites off the prints, laying out pipe runs and related electrical work on site and supervises the work performed by the Ace electricians. Roberts also performs some estimating and preparation of bids for future jobs, primarily in the area of labor costs, while Martin does the material costs portion of the bids, based on his experience in performing this work for Conroy.

Martin's employment by Conroy has continued after Ace commenced operations and Conroy had become a source of revenue for Ace. Tom Roberts spends a lot of time in Martin's office at Conroy on Ace's business. As will be recalled, Ace also maintains a P.O. box in Plattsburgh as a business address, and a separate telephone number, and Martin also has an office in his home.

Tom Roberts denied that he ever had a discussion with Martin concerning the labor problems that either AC Electric or Boyce had with the Union, or ever informed Martin that there was litigation in the courts concerning whether AC Electric was bound by a collective-bargaining agreement with the Union. Roberts did admit that he had asked Martin for a day off from work in December 1995, in order to go to New York City to attend a hearing involving some union problem. This most likely was the oral argument conducted in the U.S. Circuit Court of Appeals on the Union's Motion and his Cross-motion, for Summary Judgment. Its court house is located in New York City. However, since the court's summary order issued on November 21, 1995, the argument was held sometime before that date but sometime after the district court's decision of February 13, 1995. Thus, Roberts recollection of the month of his attendance is in error. The argument was probably held some weeks to a month or so prior to November 21. A later stipulation fixed the hearing Roberts attended as the Second Circuit Court of Appeals argument and the date as sometime in November 1995.

In the underlying unfair labor practice proceeding, Tom Roberts testified as follows: On September 14, 1994, he was then working on an estimator for Boyce and driving a truck around that had AC Electric printed or painted on the side. Roberts' explained it was not his truck, but was a truck of the corporation his wife owned. Tom Roberts had prepared a certificate of discontinuance of business which he signed and dated December 31, 1993. Although Roberts claimed his lawyer was supposed to file it the with the appropriate state authority, it was not until Roberts had received a copy of the reinstated unfair labor practice charge filed on April 6 that Roberts asked his lawyer for a copy of the certificate and then received one showing it had been filed on April 8, 1994.

In the underlying proceeding, Roberts explained that his wife was office manager, bookkeeper, receptionist, and supervisor for Boyce, but performed no electrical work herself. This testimony conflicts with his testimony summarized earlier in which Roberts acknowledged that his wife, Karen, was not responsible for supervising employees on the job.

As for the vehicles Boyce uses in its business, all four of them continue to retain the same markings as described. Title was transferred from Roberts to his wife at the end of December 1993.

Roberts also testified in the underlying proceeding that some of the various items of tools and equipment he owned and which were stored in the trucks were being used and similarly stored by Boyce after it started business. Roberts claimed, but did not produce any documentation, that he had received approximately $17,000 for the transfer of the tools and equipment to Boyce. When referred to that claim in the instant hearing Roberts now disclaimed that figure and, instead, relied solely

[6] These facts are culled from a set of stipulations executed and agreed to by all parties. It is apparent that the three latter described vans are three of the four vans, title to which Tom Roberts transferred to Boyce and the understanding regarding which was memorialized in his letter to Boyce's attorney dated December 26, 1993. I may reasonably infer that the purchase prices cited represent an approximation of fair market value.

on his letter to his wife's attorney dated December 26, 1993, for the complete financial transactions between them.

Roberts further testified that between October and December 1993, he had employed Russ Lester, James Gill, and Joseph Dufrane as electricians and they each became employees of Boyce from January 2, 1994. The time line in evidence shows that four others, John Myers, James Boyce, Christopher Hilpl, and Donald Katzfey, also worked for him until the end of 1993, and also immediately transferred to Boyce's payroll at the beginning of January 1994. Roberts could not report what separate application procedure they underwent when they were hired by Boyce.

While Boyce has continued to perform residential and commercial electrical work as did Roberts himself, it has done a lot more service work and less construction work than he himself performed.

In the underlying proceeding, Roberts contradicted his testimony given in this proceeding that he supervised the electricians employed by Boyce. He swore that only James Gill supervised and that he only worked as an estimator.

Roberts also denied in the underlying proceeding that no job that had been bid or awarded to AC Electric was subsequently performed by Boyce. As we know, Roberts admitted in this proceeding that Boyce completed a number of jobs still in process when he closed operations in December 1993.

Roberts noted that he had referred all of his previous customers to Boyce and he did so when they asked for prices or got their bills. Since AC Electric and Boyce had the same business telephone number and fax line it was a relatively easy way to refer these core customers to Boyce for their service or related work.

Roberts now testified that as concerns any equipment, other than vans or trucks, Boyce commenced operations using the electricians' tools, power tools, perhaps a threader, and ladders which he had owned and used in his business as AC Electric. Ownership to these pieces of equipment was not transferred to Boyce by any document. They appear to have been kept in the vans, ownership to which were transferred.

With respect to preexisting customers of AC Electric, Roberts referred all of them to Boyce whenever he was contacted by any of them on and after December 31, 1993. And he did so automatically, without informing any of them that their work was now being performed by a new or separate business enterprise. This charade of claiming independence in this proceeding but in fact trading on AC Electric's name, good will, experience and contacts carried over, of course, in the manner in which the two entities' telephone and business addresses were retained, and in the way in which the "new" Company name retained AC Electric as a division of Boyce Enterprises in lettering on the vans and retained AC Electric as the name under which Boyce Enterprises did business on its checks and on its letterhead.

During his cross-examination by ECM counsel, Roberts explained that Ace Electric had a substantially larger operation than either AC or Boyce, and had a minuscule portion of its business in residential electrical work, compared with 30 percent for AC and 15 to 20 percent for Boyce.

Roberts also acknowledged that Martin was running Ace on the side while employed full time by Conway. There was also a period of some 6 months, from late March to September 1996 during which Boyce and Ace were competitors in the electrical subcontracting field.

Robert also offered some testimony relating problems he had with the Union which led him to attempt to cancel his letter of assent in early December 1992. However, by virtue of the litigation which Roberts brought and which ended on appeal with a final resolution binding him to the union agreement and its successors, I find that Roberts is collaterally estopped from contesting in this proceeding his obligation to comply with its terms insofar as they establish the basis for the make-whole remedy against him.

Roberts also repeated earlier testimony denying that he told Martin about the pending unfair labor practice charges or proceeding prior to his becoming employed by Ace. He was embarrassed by the proceedings and didn't believe it was any of Martin's business. Neither did Martin inquire of any potential liabilities of AC or Boyce or of any personal liabilities of Roberts or ask Roberts for an indemnification agreement.

Roberts also claimed that his wife started Boyce as a woman owned business enterprise which would enable it to obtain an advantage in obtaining Federal contracts from the local air force base in Plattsburgh. Later testimony established that Karen Roberts never sought such business on behalf of Boyce.

Roberts then denied that Boyce was started in order to avoid any potential liability for unfair labor practices or under a collective-bargaining agreement with the Union. It will be recalled that the original charge had been filed on November 12, 1993. While it was withdrawn in mid-December 1993 (and later refiled in April 1994), Roberts surely had no reason to believe, absent any settlement of the Union's outstanding grievances against him at the time, that he was in a position to resolve his union problems when he ceased operations and his wife took over the business operation. Indeed, Roberts had been summoned to a union-employer grievance committee meeting just days before he ceased operations and he surely learned from his wife, who did attend in his absence, the likely result that the committee would find him in breach of the contract terms and liable for correcting them.

At this December 29, 1993 meeting, neither the Union nor NECA were informed of Roberts' intention of going out of business 2 days later, either by way of a notice from Roberts himself or a statement from his wife who was about to succeed to the business with her own corporation 4 days later.

As an employee of Ace Electric, Roberts is paid a salary of $725 weekly for 40 hours but receives pay for overtime hours worked at one fortieth of his salary. As a salaried employee of Boyce, Roberts was paid between $300 and $400 weekly.

Regarding AC Electric's customers, of a list of 90 which Roberts provided for the year 1993, 20 later became customers of Ace Electric. Among these 90 customers, Roberts identified 17 who were his largest. Four of them, Hills, Price Chopper, Schonbek, and Conroy and Conroy, also became customers of Ace. These four comprised 25 to 30 percent of AC's business. As to one large AC customer on the list of 17, Duquette Brothers Construction, a general contractor and direct competitor of

Conroy and Conroy, Martin has refrained from bidding on any of its job since he is unwilling to help Duquette at the expense of his regular employer, Conroy.

Karen Roberts explained that given Tom Roberts' unavailability, she attended the December 29, 1993 joint labor management committee meeting at the request of her husband's attorney. She related that their was no particular reason for Boyce's formation in late 1993. She placed the new marking on the four vehicles she took over. Under "AC Electric" she now added "A Division of Boyce Enterprises." Her husband gave her the equipment, hand tools, circuit breakers, ladders, which were already stored in the vehicles. She purchased new registrations for the vehicles in her own name and placed them under a separate business insurance policy.

After her husband left the business in May 1996, to work for Conroy, Eric Harvey bid the new work for Boyce. After finishing up for Boyce on August 23, Harvey immediately became employed by Ace on August 26.

Both Russ Lester and Eric Harvey told Karen Roberts they needed health benefits when they left Boyce's employ for Ace Electric.

When Boyce ceased operations in August 1996, one job on which Boyce electricians had already performed installation of temporary and permanent electric service, as a subcontractor of Conroy, for a company called Batatt located in the Plattsburgh industrial park, was completed by Ace electricians. Boyce also supplied to Ace and billed Ace for the time of two electricians, Lester and Harvey, for a couple of jobs performed by Ace before Boyce ceased operations.

Karen Roberts dealt with Martin, when, while Boyce was still in business, he called to solicit Boyce for a Conroy job and, later when she supplied electricians for Ace.

After Tom Roberts left Boyce in May 1996, he continued to help Karen Roberts at night with Boyce's paperwork without being paid. By the time Harvey left Boyce in August 1996, Karen Roberts decided to go out of business, as the work had gotten slow.

Inquiries about commercial electrical work that Boyce or AC Electric has received since August 1996, Karen Roberts refers to Ace.

Ed Martin testified that he is the president and sole shareholder of ECM which incorporated on March 26, 1996. There are no other officers. At Conroy, Martin progressed over time from bookkeeper/accountant to becoming an estimator, reading blueprints and figuring job costs. Until sometime in 1995, he was Conroy's sole estimator, with help from Will Conroy, as well as accountant and office manager. While Conroy's main estimator, up until mid-1996, he was in charge of letting out subcontracting work.

Up until December 31, 1993, AC Electric performed electrical subcontracting work for Conroy on a fairly regular basis, performing between 70 and 80 percent of such work. One day a week on average, Martin had regular business dealings with Roberts, on estimating jobs and the like. Since Boyce began operating in early January 1994, Conroy's use of Boyce was similar to its earlier use of AC and Martin's dealings with Tom Roberts remained the same as it had previously when he was operating his own business as AC Electric, as did his dealings with Karen Roberts.

In starting ECM, Martin was looking to get supplemental income. In late January, early February 1996, while Roberts was working for Conway, Martin approached Roberts about forming a new electrical subcontracting company. Although Roberts' reaction at first wasn't very positive, over time as his hours started to be reduced by late February, the idea took hold with him. While Roberts' rejected a partnership, Martin next proposed a package, which provided for Roberts financially and limited his responsibilities to those he enjoyed doing. According to Martin, Roberts was disillusioned with being in business for himself and appeared to be unhappy with a lot of things. Roberts did agree to Martin's proposal, the corporation was formed and began operating.

Tom Roberts pretty much runs the operation outside of the administration level. He manages the staff (of electricians), he insures they're at the jobsites to which they are assigned, he schedules their work and insures it is done, works a lot with the clients, takes the calls that come in through the answering service Ace is now using and responds to them, including allocating men to take care of a particular problem if it's something that can be handled quickly.

Martin sees Roberts at least once a day at Conroy, sometimes twice. They maintain regular contact during the day through use of Conroy's office radio and Martin also has a cellular phone for this purpose. A lot of the contact has to do with Conroy matters, i.e., jobs being performed for Conroy by Ace. ECM does roughly 80 percent of its business with Conroy, representing $300,000 of the roughly $420,000 gross volume of business it has done in the year since it began operating. ECM's business is primarily commercial in nature.

Neither Tom nor Karen Roberts had told him about a prior unfair labor practice proceeding or litigation with any labor organization. He had no such knowledge when ECM was formed.

Martin was confronted by counsel for the General Counsel with a commerce questionnaire signed on April 12, 1994, by a Michelle Randolph, A Conroy secretary, submitted to Conroy on April 12, 1994, by the Board's Regional Office, seeking to determine whether AC Electric, which furnished services to Conroy recently, met the Board's jurisdictional standards on its investigation of the underling charge in this proceeding. A covering letter from the Region referred to the charge filed against AC Electric. Ed Martin's name and title as manager was typed in as representative of Conroy best qualified to give further information concerning the operations of its business. Conroy's gross volume of purchases of materials or services directly from outside the State was noted, by an x mark placed in a box relating to its interstate purchases, as exceeding $50,000 during the past year.

Martin could not recall Randolph discussing or asking him in April 1994, for this information. Neither could he recall Randolph informing him that she had received a letter and questionnaire from the Board. Martin agreed Randolph would not normally have had access to Conroy's interstate business transactions, and would have had to obtain such information from himself or Will Conroy.

Martin did recall Tom Roberts telling him in the latter part of 1995 or early 1996 that he had to go to court about something. Martin was aware Roberts asked for the day to appear in New York City at court somewhere but he, Martin could not be more specific about it, as he didn't inquire a whole lot more about it.

Martin has no idea whether AC Electric was union or nonunion, he and Roberts never discussed the matter. Conroy is a nonunion contractor, so is ECM, but he never discussed this subject with Roberts.

Martin could not deny that in selecting Ace Electric as the name under which ECM Enterprises, Inc. chose to do business and advertise itself to the public, he was influenced by, and deemed favorable, the name's close connection to a business, AC Electric, which had been established for several years.

Besides the three vehicles he purchased for fair market value from Boyce, Martin also purchased more than $10,000 worth of equipment from Boyce, including a power puller, a generator, a pipe bender, hot box, band saw, hole punch, several ladders, a threader, and small hand tools. In determining what tools and equipment to purchase and their price, Martin relied on discussions with Tom Roberts. These items of equipment are reflected in four separate bills of sale dated between April 11 and July 12, 1996, which Karen Roberts signed as president of Boyce, but on letterheads which read AC Electric and contained the Roberts' residence address and AC's and Boyce's business address, 248 Allen Road, Plattsburgh.

Besides the 80 percent of its business which Ace Electric does with Conroy, a number of other major customers, among them Deb Stores at the Pyramid Mall which represented 12 or 13 percent of its total income for the first year of its operation, Burger King, Myers, and Schonbek, had each done business with Tom Roberts, as manager or estimator for AC Electric or Boyce.

The Debs job alone, had a gross volume of $200,000, and Tom Roberts' past relationship with the store had a great deal to do with the award of the electrical subcontract to Ace. Conroy was the general contractor at the site as well.

Furthermore, certain work previously performed for Conroy by AC Electric or Boyce was now being referred to Ace Electric.

In describing the full extent of Roberts' responsibilities and duties for ECM, which covered just about everything outside of the office, Martin noted that he had a permanent job with Conroy and wanted to keep it. His weekly hours for ECM total 15, his hours for Conroy total 45. Roberts' duties extended to hiring, firing and disciplinary matters, but Roberts discussed these decisions with him. Ace started operations with four electricians, including Tom Roberts, each of whom had been previously employed by Boyce, and three of whom came to Ace without any time gap, except for Roberts who worked by Conroy for about a year from March 1995 to March 1996; only Randy Trudeau, who had been laid off by Boyce on January 26, 1996, and was thereafter collecting unemployment benefits, has any hiatus before becoming employed Ace on April 5, 1996. A fifth electrician Russ Lester, also came directly from Boyce in May 1996. At the time of the hearing, Ace employed seven electricians, excluding Roberts, including three who had not previously worked for Boyce.

As described by Martin, Tom Roberts recruited Trudeau, John Myers, and James Boyce for Ace in late March and early April 1996. At its beginning, Ace had a separate business telephone number set up at Tom Roberts' residence, with an answering service. More recently, since July 1996, Ace has its own answering service and two-way radio communication. When additional manpower was needed on certain early jobs, Martin arranged with Karen Roberts for Boyce to supply them. The two contract electrician supplied this way, Russ Lester and Eric Harvey, later became Ace electricians, joining the original four Boyce employees on ECM's payroll. Martin had Roberts approach Harvey, a good electrician, to offer him health benefits to induce him to join ECM when he had finished up for Boyce in late August 1996.

At Christmas 1996, Tom Roberts was paid a bonus of $1500. All the other electricians, but one who started in October 1996, received 1 week's pay. On pay raises, Martin makes the final decision but asks for and respects Tom Roberts' opinion. The range of hourly pay for Ace's electricians ran from $9 to $18.12.

As to the Battat electrical job, which Boyce had started but did not complete as a subcontractor for Conroy before it ceased operating in August 1996, Will Conroy permitted Ace to finish it, and Ace billed and was paid $105,000 of the total price for the job of $128,000.

Martin was the sole investor for Ace's startup costs. Ace has its own logo, a separate line of credit and separate IRS identification number. ECM pays health insurance premiums for three of its employees and their dependents, at a cost of roughly $745 per month.

During his cross-examination by ECM's counsel, Martin acknowledges he had no formal training in labor relations, Canadian born, Martin had experience in accounting, office managing as a controller, and in finance and insurance. None of his background included dealing with unions. And, although Conroy had subcontracted on occasion to a union subcontractor Martin himself was not involved. He was not previously aware of the NLRB, had never read a union contract nor been a union member.

Martin confirmed the close and extensive subcontracting relationship from 1991 to 1993 between Conroy and AC Electric.

Martin explained that he and his family have taken a vacation during the school spring break for the last 4 or 5 years at Myrtle Beach, South Carolina. This usually occurs in early or mid-April. Yet, Martin could not testify that he was at Myrtle Beach on April 12, 1994. Neither was he able to produce any documents showing his presence there on that date. He could just not recall seeing or receiving the Regional Office commerce questionnaire.

The only mention Tom Roberts ever made to him about a union was toward the end of 1995 or the beginning of 1996 when he disclosed that he had a court appearance in New York City, but he had no other discussions with Roberts about any matter he may have had with the Union. Martin was vague and somewhat imprecise in describing his conversation with Roberts at the time. Martin did say he learned that Roberts' engagement involved a union matter when he explained to Will Conroy his need for the day off. But Martin sought to excuse

his lack of recall as stemming from the turmoil in his life at the time since he and his wife had separated in mid-December 1995, he was having problems at Conway with a new employee and problems with another sideline business investment in a restaurant.

When Martin offered Tom Roberts a $125 increase in his salary, above his $600 a week at Conway, and health benefits for himself and his family, Roberts' initial reluctance to become involved in operating a business was overcome, particularly since Martin himself would handle the accounting, payroll, and related matters.

While Roberts had significant input on personnel matters and his recommendations were generally followed, on one occasion when Roberts would have given the employees another chance Martin asked Randy Truduea to let go an electrician whose attitude was questionable.

With respect to Ace Electric's customers, documents prepared by Martin and received in evidence, show that Conroy is Ace's largest customer by far, accounting for a very high percentage of its total business income for the 10 months between April 11, 1996, and February 22, 1997. The second largest customer is Deb Stores on which project Conroy was and is the general contractor. Aside from Conroy, other larger common customers with AC Electric from 1993, are A. Schonbeck Company and Hills Department Store, and another customer, Battat, Inc., for whom both Boyce and Ace Electric performed electrical service on the same job at different periods of time.

Martin claimed he was unaware of any unfair labor practice charges filed against Tom Roberts or AC Electric until he received a letter from Board Attorney Ellison dated November 4, 1996, informing him of the procedural history in the case, enclosing a copy of the original compliance specification, the Union's allegation of Ace Electric's status as Boyce's alter ego, and advising he was investigating the allegations. Martin's receipt of the letter was also the first time he because aware of Randy Bashaw and Raymond Rothamel as discriminatees in the case.

The copy of the letter received in evidence contains the handwritten word "successor" in the margin next to the phase in the letter, "alter ego of Boyce," which Martin wrote, perhaps after a conversation with Ellison.

Martin further testified that he never received any notice from the Union that it was making claims against Ace or seeking recognition from Ace.

During an initial series of questions from ECM counsel, Martin explained that after receiving the Board letter, he called Roberts, had a brief conversation with him, and then tried to get together information for presentation to Board Attorney Ellison on his inquiry. At no time did Martin express surprise or anger that Roberts may have mislead him, appropriate responses for one claiming the status of an innocent third party, unaware of the multiple court orders outstanding against the operations manager of his business.

While Martin informally denied knowledge of labor relations and the role of the National Labor Relations Board in regulating conduct in the area of labor relations, he was aware that as a nonunion electrical subcontractor he had an advantage in underbidding union firms for electrical jobs. Further, in his 9 years' association with Conroy, Martin was unable to recall any specific instance in which Conroy subcontracted electrical work to a unionized electrical contractor. He also agreed it was a strong possibility that on one occasion, although a union subcontractor, S and L Electric, was low bidder by $400 on a particular job for Conroy, nonetheless the work was awarded to AC Electric or Boyce. Martin insisted that the past relationship and experience with AC and Boyce outweighed any minor saving in cost.

James Gill, who worked for both AC Electric and then Boyce continually from March 1993 to July 19, 1995, testified, contrary to Roberts, that Conroy supplied probably 60 percent of AC Electric's electrical work. Recall that Roberts testified that he and Gill supervised the projects and Gill confirmed this. Gill explained that overtime hours were paid partly in cash. When paid for in cash, the payment was at straight time after 40 hours worked in the week.

When Boyce started operating, Tom Roberts simply removed the registration from the van Gill was using on a job and returned two hours later with a new registration in the name of his wife, Karen Roberts. Everything in terms of work, assignments, his continuing to report to Tom Roberts, Roberts' job functions, and paperwork continued the same as before, except the name "Boyce Enterprise" was added to the top of the AC Electric letterhead on all ongoing jobs. Karen Roberts never supervised Gill on the job and only visited small jobsites once in a while. When a few customers inquired about the change, Gill expressed ignorance. At some point in time, the pay checks, which had continued to bear the AC Electric name, were changed to Boyce. Either Karen Roberts or Tom Roberts signed Karen's name on these checks. Tom Roberts also signed change orders for Boyce jobs. After the Boyce Enterprise name was added on the vans, Gill continued to drive the same van, receiving the same rate of pay, servicing the same customers in the same type of work.

On out-of-town jobs, Gill used the same credit card, Tom's personal one, as he had used before Boyce started.

Gill was laid off from his job with Boyce on July 21, 1995, by Tom Roberts, and that evening received a registered notice of termination signed by Karen Roberts because of allegedly stealing outside lights while on a job at the Hoyt Cinema in Plattsburgh. Gill had been offered two of four lights by the contractor from Maine who was removing them and who himself took two for himself. At the time, Gill later learned that Roberts was working for Conroy while still performing work for Boyce on all of its jobs.

At one point in the period after adding the name "Boyce Enterprises" to the vans, while having some beers at his residence, Tom Roberts joked and said, "Well, if anything ever happened, it'd be no problem to make that 'Ace Electric,' all I have to do is add an E to it."

During the period of Boyce's operation and until his termination, Conroy's share of Boyce's business grew to even more than 60 percent. Boyce did all of Conroy's buildings. This is contrary to Tom Roberts' testimony.

Under cross-examination, Gill denied admitting stealing light fixtures from Hoyts Cinema. He excluded the period of his employment by AC and Boyce from, an updated personal re-

sume he prepared. It is apparent, and Gill confirmed, that he omitted any reference to AC or Boyce on his resume so as to avoid any negative references to a prospective employer. A New York State Department of Labor notice of determination to claimant mailed August 24, 1995, finding Gill ineligible for unemployment insurance benefits for a limited period of time on the basis of his having lost his employment through misconduct in connection with his last employment, was received in evidence. Gill had filed for unemployment benefits claiming a layoff. This notice was based on information supplied the department of labor by Boyce. Gill did not contest it or request a hearing because he found work. The document does not constitute a finding on which I can place any reliance, particularly in the absence of a hearing process including testimony taken under oath.

Respondent's Defense to Raymond Rothamel's Backpay Claim

Raymond Rothamel's examination by ECM counsel disclosed that for a period of time from June 1994 through December 1996, Rothamel had operated an electrical contracting business under the name "Watts Up." Starting in July 1994, and continuing into May 1996, Rothamel's personal monthly calendar showed that during those months he devoted a certain limited number of days to performing services in his own electrical contracting business. During those days, he agreed, he was not out pursuing other work. Both his 1994 and 1995 Federal tax returns show net losses derived from the operation of his business, of $1959 in 1994, and $1514 in 1995. Rothamel did not pay himself a salary from the business in those years.

In starting the business, Rothamel expected to earn money from the endeavor, but those expectations were not fulfilled. In 1994 Rothamel's gross receipts totaled $4562. In 1995 they were less than half that amount, $2078. Rothamel explained he did limited advertising in the beginning and was basically waiting for customers to call him. By 1995 he was securing fewer jobs. While Rothamel's quarterly earnings record shows interim earnings in various quarters derived from employment which reduced his backpay claim, Rothamel's self employment resulted in no reduction of gross backpay in any quarter.

Following the close of hearing, by direction of the undersigned, the counsel for the General Counsel advised all parties by letter why there was no provision in the amended specification for the second, third, and fourth calendar quarters in 1994. Counsel for the General Counsel explained that during those three quarters AC Electric's only employees were its core group consisting of Dufrane, Gill, Lester, and Myers, each of whom had been employed long before the two discriminatees were denied employment. (One other employee; whose inclusion on the time line shows employment in 1994, actually worked instead in 1995 based on Boyce payroll records.) Thus, the hours worked by these four were excluded from computation of the average hours worked by employees of AC and Boyce since they would not have been replaced by the discriminates. This letter dated March 28, 1997, shall be included in the record as Administrative Law Judge, Exhibit 1.

Credibility Resolutions

Based upon my observation of Thomas Roberts as a witness and in light of the numerous conflicts uncovered between his testimony in this proceeding and the underlying proceeding I am persuaded that his testimony that he never informed Martin of his unfair Labor practices and union contract litigation are not credible. I also discredit his testimony denying his status as manager of Boyce's operations, even after he became employed by Conroy, and any testimony which may have sought to minimize his direction and control of ECM's electrical subcontracting operations as full operations manager. I credit James Gill's testimony including those portions of it which contradict Roberts' testimony, particularly Roberts' layoff of Gill from employment with Boyce in July 1995. In this connection, I am not persuaded that Gill's discharge and its circumstances lessens the credibility of Gill's enumeration of all of the factual elements which show AC Electric's disguised continuance of its business enterprise through the guise of Boyce, including Thomas Roberts' key management and supervisory role in the continued business enterprise. Particularly telling is Gill's attributing comments to Tom Roberts showing how AC Electric, which continued as a business name throughout the time that Boyce was operative, could easily become Ace Electric as, in fact, it became, once Martin entered the picture.

Martin's denials that he ever learned of Roberts' unfair labor practices or that Roberts' was a party to a binding collective-bargaining agreement are also not credited. Martin's evident lack of ease and awkwardness when pressed on the record about his becoming aware of Roberts' leave to attend the argument in the court of appeals shield an unwillingness to disclose the full extent of the information he learned of Roberts' legal trouble at the time. It is also evident that a man of Martin's evident sophistication in business affairs, and understanding of Conway's (and Ace's) advantages in operating nonunion, would not have entered a new business relationship with Roberts unaware of any outstanding debts or potential obligations arising from Roberts' past business dealings, both as AC Electric and Boyce. I thus deny his claim, that he lacked any knowledge of Roberts' Board or union litigation. I further find that, apart from the foregoing, Martin learned of Tom Roberts' status as a charged party in the unfair labor proceeding bearing this case number when his office received the Region's commerce questionnaire. Inasmuch as Martin's own name was typed on the form by Conroy personnel as the one best qualified to provide further information, his secretary signed the response for him, and only he or Will Conroy would have the information to respond, I conclude that ECM's failure to call either Will Conroy or Michelle Randolph to deny Martin's involvement, permits me to draw, and I do draw, the adverse inference that neither witness, with both of whom Martin was still associated in employment, would support his claim of lack of knowledge of the questionnaire. See *International Automated Machines*, 285 NLRB 1122 (1987). Thus, I conclude Martin did have such knowledge, particularly where Martin did not deny he received the document, testifying only that he could not recall doing so, and he could not swear he was away on vacation during the week it was received and answered.

Analysis and Conclusions

The first significant issue is whether or not Boyce is AC's alter ego. The Board has set forth several test's to determine whether one employer is in fact the alter ego of another. In order to find alter ego status, the two entities must have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership. *Advance Electric*, 268 NLRB 1001, 1002 (1984). In addition, the Board ascertains whether the second Company's creation was legitimate or merely a disguised continuance of the former employer so as to evade responsibility under the Act. *Southport Petroleum Co. v. NLRB,* 315 U.S. 100, 106 (1942).

Boyce is clearly AC's alter ego. Both Companies engaged in electrical contracting work, both operated their business from the same location with the same phone number, and the same equipment. The transfer of rights in the equipment between AC and Boyce show less than arm's-length transactions, since the record reveals that the canceled checks from Boyce to AC for payment of such equipment, were drawn on a bank account in the name of "Boyce Enterprises, Incorporated, d/b/a AC Electric," the vans were sold to Boyce for sums well below fair market value, and Boyce never paid AC Electric for its start up tools and equipment with a worth of some thousands of dollars at least. Roberts himself claimed to have received $17,000 for them, but could not support that assertion, finally abandoning it together. And Martin paid Boyce over $10,000 for Boyce's tools in the spring and summer of 1996 which likely included some, if not all, of the same tools Boyce originally inherited from AC.

Furthermore, the record shows that Boyce hired all of the employee's working for AC at the time AC ceased operations. In addition, AC referred all its customers to Boyce. In fact, Boyce finished several jobs that AC had started. Moreover, Roberts' position at Boyce involved the same work he did at AC. He also continued to supervise the same employee's at Boyce that he supervised at AC. As far as the employee's and the customer's were concerned, they did business with AC one day and continued doing the same business the next day with the same people operating under a different name. Even though Roberts left his position at Boyce to work with Conroy & Conroy he continued to work with Boyce electricians.

The facts regarding ownership also call for a finding of alter ego status. Even though Thomas Roberts was the sole owner of AC and Karen Roberts is the sole shareholder of Boyce, according to the Board, the ownership is substantially identical. In *Kenmore Contracting Co.,* 289 NLRB 336 (1988), the Board found common ownership in a company owned by two brothers and a former company owned by their parents. The Board stated that even though "the same individuals are not shown to be owners of each corporation, the corporations are solely owned by the members of the same family," and therefore sufficiently related to establish substantially identical ownership. Id. at 337; see also *McDonald's Ready Mix Concrete,* 246 NLRB 152, 154 (1979), where the Board held that the distinction in the ownership of two companies loses significance when there is a close familial relationship such as father and son. In the instant case, my conclusion that ownership of AC and Boyce is substantially identical is enhanced by other factors strongly supporting actual rather than technical ownership, including those noted above showing the stark absence of arm's-length dealings.

While the existence of a close family relationship will not always establish the common ownership element in an inquiry, alter ego status can, nonetheless, be found even absent element of common ownership. In *Blake Construction Co*., 245 NLRB 630, 634 (1979), the Board stated that not all of the factors have to be satisfied and that identical ownership is not crucial for a finding of alter ego status. So, assuming arguendo, that there is a lack of common ownership in the relationship between AC and Boyce, the Board can still find alter ego status here as I have done.

Whether the creation of Boyce served a legitimate purpose or was just a means of continuing AC's existence under a disguise is also indicative of an alter ego relationship. While Karen claims that she started Boyce in order to receive favorable consideration for Federal contracts, she never bid on a federal contract. Karen began her company by taking over the jobs, customers and employee's that AC had at the time it ceased operations. Furthermore, the fact that Boyce and AC held themselves out to be one and the same demonstrates an intention to evade responsibility under the act by disguising AC as Boyce. Recall that a NYNEX phone directory listed an advertisement for AC Electric as a division of Boyce Enterprises, Inc. The date on the listing reflects a period of time after AC had ceased its operations. Finally, the timing of AC's cessation of business and Boyce's commencement, without any other explanation for its timing and immediately following AC's appearance before the joint labor-management committee and Roberts learning that his contract obligations would be confirmed and enforced, and without informing the Union of this transfer to an allegedly independent entity, buttresses the conclusion that Boyce was created to avoid liablility under the Act and in its obligations to the Union. Although the Union's unfair labor practice charge of November 12, 1993, had been withdrawn by December 14, 1993, as earlier noted, based on Roberts' failure to resolve his differences with the Union, he was aware that the Union's claims would continue to be strongly asserted.

As AC's alter ego, Boyce is bound by the bargaining agreement and therefore derivatively liable for remedying AC's unfair labor practices. See *Custom Mfg. Co.,* 259 NLRB 614 (1981); *George C. Shearer, Exhibitors Delivery Service,* 262 NLRB 622 (1982). The Board has consistently held that alter ego*s* are liable for remedying the unfair labor practices of the former employer to the same extent that the former employer is liable. See *Red Carriers, Inc.,* 301 NLRB 1113, 1115 (1991). ("If alter ego status is found to exist the labor obligations of the original employer will be deemed to be shared by its alter ego, and both will be held liable, as a single employer, for any violations of the Act.") See also *Herbert Industrial Insulation Corp.,* 319 NLRB 510 (1995), enfd. by summary order No. 97–4143, (2d Cir. 1998).

Apart from its status as AC's alter ego the evidence is clear that Boyce is a single employer with, and successor to AC, as alternatively alleged in this case. See, e.g,. *Evans Plumbing Co*., 278 NLRB 67, 68 (1986). Furthermore, Boyce is a successor with full knowledge of AC's unfair labor practices, and

thus liable to remedy them under *Golden State Bottling Co.,* 414 U.S. 168 (1973).

It is clear that as a sole proprietor of his business enterprise, AC Electric, Thomas Roberts is personally liable for the unfalr labor practices committed by AC as well as by Boyce, its alter ego. *Denart Coal Co.,* 315 NLRB 850 (1994). With respect to Boyce, counsel for the General Counsel urges, for the first time, in his post trial brief, that Karen Roberts should also be held personally liable, that the circumstances are appropriate for piercing the corporate veil, and cites case authority to support this contention. In each of the three cases cited on page 31 of counsel for the General Counsel's brief, unlike the pleading herein, the complaint or backpay specification specifically alleges the personal liability of corporate officers and shareholders. I am unwilling to order such relief herein. Due process considerations forbid it. Inasmuch as Karen Roberts was not put on notice by the pleadings, or even at trial, that a claim would be made to hold her personally responsible here I cannot impose such a remedy. See, e.g., *Abraham & Strauss,* 287 NLRB 951 (1987). Had Karen Roberts been placed on fair notice of this claim, she might very well have retained counsel and vigorously defended the allegation, instead of appearing pro se as she did. In the absence of the issue's fair or full litigation, I deny the Government's request for this remedy.

The next issue posed is whether ECM is a successor employer to AC/Boyce. The successorship question turns on whether, in view of the "totality of the circumstances," there is "substantial continuity" between the new and predecessor employer. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The Board examines whether the new company "'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 184 (1973). In particular, the Board has held the continuity of the work force is the determinative factor. In measuring continuity of the work force the Board inquires as to whether the business operations remained essentially the same after the transfer, whether the new employer is using the same employees, the same supervisory personnel, and the same equipment and facilities as its predecessor, *Cruise Motors, Inc*., 105 NLRB 242, 247 (1953).

Applying the Board's criteria to the instant facts, the conclusion is warranted that ECM is a legal successor to AC/Boyce. At its start up. ECM operated out of Tom Roberts' residence and the business address of AC and Boyce, using Roberts' telephone listing. Although this business address later changed, ECM continued to list the same address in the NYNEX directory, 248 Allen Road, in Plattsburgh. ECM is an electical contracting company, as was AC/Boyce, although it is a somewhat larger operation and has a greater percentage of its business in industrial work. Nonetheless, ECM, as did AC/Boyce before it, relies to a large extent on subcontracting work supplied by Conroy and Conroy, and a number of its major customers had each done business with Tom Roberts, first as AC, and then as manager/estimator for Boyce.

ECM has also hired a majority of employee's who once worked for AC/Boyce. Of the nine persons now employed by ECM, six were once employees of either AC, Boyce or both. These employee's were hired with no substantial hiatus between employment. The longest hiatus was 2 months, for one employee. The other employees were hired by ECM between 3 to 10 days after their employment with AC/Boyce ended. Most significantly, Tom Roberts has continued as the key estimator and outside jobsite supervisor and manager of ECM, just as he was for AC/Boyce.

Furthermore, ECM purchased a substantial amount of assets from AC/Boyce that were used for the operation of the same type of enterprise. ECM received most of its work referrals from Conroy & Conroy, as did AC/Boyce. In addition, ECM finished several jobs that were started by AC/Boyce. The changes undergone in the businesses at hand were nominal and the conclusion is warranted that ECM is AC/Boyce's successor. See *Harter Tomato Products Co. v. NLRB,* 133 F.3d 934 (D.C. Cir. 1998).

Before any liability can attach to a successor, however, an inquiry must be made into the successor's knowledge of the unfair labor practices of its predecessor. *Golden State Bottling Co.,* supra. While Martin claims he knew nothing of the unfair labor practices of AC/Boyce, the evidence and circumstances surrounding the formation of the three companies, including my credibility resolutions, show otherwise. Furthermore, by virtue of the role of Thomas Roberts, in jointly planning the creation of ECM and assuming the major functions, if not as partner then as the operations manager just as he was for AC/Boyce, effectively advising and making important personnel decisions and labor estimating, running and supervising ECM's subcontracting jobs, I conclude that Roberts' knowledge of his own unfair labor practices while operating both AC and Boyce may be fairly imputed to Martin and ECM. *General Wood Preservative Co.,* 288 NLRB 956, (1988). The Board in *General Wood* noted that the successor discriminatively refused to hire know union activists through its production manager who had held the same position with the predecessor. I am satisfied that in entering his electrical subcontracting business in pursuit of non-union jobs, with a de facto partner, Roberts, whose skills, experience and good will in the non-union segment of the business, Martin was anxious to utilize, Martin must be held accountable for Roberts' past conduct in discriminatorily refusing to employ union members. See also *York Printing Co.*, 308 NLRB 1146, 1147 (1992); *Sav-On Drugs*, 300 NLRB 691, 693 (1990); and *Marbro Co*., 310 NLRB 1145, 1150 (1993). The point also must be made here that once the General Counsel has established ECM's successorship status, the burden is on the successor to show that it lacked knowledge of its predecessor's unfair labor practices. *Blu-Fountain Manor,* 270 NLRB 199, 210 (1984), enfd. sub nom. *NLRB v. Jarm Enterprises,* 785 F.2d 195 (7th Cir. 1986). I conclude that ECM has failed to meet its burden, under all the circumstances appearing in the record, and I may find the requisite knowledge from reasonable inferences derived from the record as a whole, as I have done. *M & J Supply Co.,* 300 NLRB 444 (1990).

Under *Perma Vinyl Corp.,* 164 NLRB 968 (1967), a successor employer charged with notice of unfair labor practices proceedings against its predecessor will be held liable for remedying the predecessor's unlawful conduct. Id. At 969. Thus, ECM will be obliged to offer to reinstate and to reimburse with

backpay the two discriminatees. As the Board noted in *Perma Vinyl* at 969:

> The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices

Under normal conditions, involving an offending employer and successor, they share a joint and several responsibility in the matter of backpay. Id. at 970. However, under the special and somewhat novel circumstances presented on this record, I am obliged to divide the backpay period into two distinct time frames. See *Daniel Construction Co.,* 276 NLRB 1093 (1985). The first, imposed solely against AC/Boyce, encompasses the period from November 4, 1993, to August 23, 1996, by which time both AC and Boyce had gone out of business. The second, imposed against both AC/Boyce and ECM, jointly and severally, commences on March 25, 1996, when ECM began operations and continues until May 1, 1996, when the backpay calculations in the amended specification conclude.

As to the make-whole remedy to be imposed against AC/Boyce for the initial period, I conclude that the amended specification makes claim for moneys which are not properly claimable or encompassed in the make whole remedy ordered imposed by the Board and court. I have no question about the inclusion of the claims for payment of union contractual wage rates for the two discriminatees as well as the reimbursement of the Union health and Welfare, Pension, Annuity and the NEBF funds on their behalf. These are fringe benefits which, are well encompassed within the usual make whole remedy ordered here for the Section 8(a)(1) and (3) violations found. *Richard W. Kaase Co*., 162 NLRB 1320 (1967); *Knickerbocker Plastic Co.,* 104 NLRB 514 (1953), enfd. 218 F.2d 917 (9th Cir. 1955). Both the wage rates and fringe benefit contributions accord with the rates set forth in the union collective-bargaining agreement and successor agreement which, I have concluded, is binding on AC/Boyce by virtue of the final determination in the federal litigation which it instituted and which it is collaterally estopped from attacking in this proceeding. Furthermore, the Board has had occasion recently to affirm an Administrative Law Judge's conclusion of a party's untimely notice of termination at any time because it did not comply with the contractual notice provision, *Visone Construction,* 323 NLRB 471, 476 (1997). Roberts' failure to provide timely and appropriate notice to all parties similarly has prevented him from terminating the original contract, or from forestalling its automatic renewal.

I also reject ECM's attack on the provision for payment, at least by AC/Boyce, of the liquidated damages and interest imposed under the Union's Pension, Welfare and Annuity Funds for delinquiencies in remission of contributions required to be made under the collective-bargaining agreements, the declaration of trusts and their rules and regulations to which AC assented when Roberts executed the letter of assent binding him to the terms of the agreement between NECA and the Union's predecessor. Roberts cannot claim he lacked notice of this provision of the contract (art. IX, sec. 9.09) and just as the fund contributions are deemed part of a make whole remedy, so too, the provisions which are designed to make whole the funds themselves for delinquent or nonpaynment of contributions on behalf of discriminatees have the same legitimate purpose.

However, neither the IBEW apprenticeship fund contributions nor the IBEW Local 910 working dues/assessments, much less the quarterly dues, claimed in the specification, have any reasonable nexus with a make-whole remedy for discriminatees arising under Section 8(a)(1) and (3) of the Act. Neither the apprenticeship fund contributions nor the dues payable to the Union provide a benefit to the two employees, the loss of which they may have suffered because of the discriminatory refusal and failure to employ them. Neither did either of them execute the authorization for deduction of working dues from their pay provided in the contract. Both types of claims are germaine and may be recoverable under a refusal-to-bargain finding under Section 8(a)(5) of the Act. But there is no such allegation or legal conclusion in the underlying proceeding, which involved only a discriminatory refusal to hire in violation of Section 8(a)(1) and (3). Accordingly, I will exclude from the make whole remedy the contributions sought for the Apprenticeship Fund, as well as the working dues and the quarterly dues allegedly owed to the Union on behalf of Bashaw and Rothamel.

As to the formulas utilized in the amended specification to establish gross backpay, as noted earlier, neither Tom Roberts nor Boyce, by Karen Roberts, disputed them. Thus, the calculations stand, and as they appear to be reasonably designed to produce as close approximations as possible to what the two discriminatees would have earned had they not been discriminatorily denied employment, I will approve them. *J/B Industries,* 245 NLRB 538, 541–542 (1979,) and cases cited therein, including *NLRB v. Brown & Root, Inc*., 311 F.2d 447, 452 (1963).

As to the questions related to interim earnings, the only issue that was raised at trial by ECM, and urged as well in its brief, pertained to Rothamel's spending certain days during the backpay period in his own contracting business to the exclusion of seeking outside employment. There is no evidence that Rothamel did not intend his business to turn a profit and provide him with some net income, and he did show earnings on his tax returns, albeit his costs each year exceeded his gross receipts. As a discriminatee is not held to the highest degree of diligence in seeking interim employment, and need only make reasonable efforts to find work, and as any uncertainty in the evidence is resolved against respondents as wrongdoers, I will not exclude any of the days Rothamel spent engaged in his personal contracting business from the calculations of gross backpay. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995); *Hansen Bros. Enterprises,* 313 NLRB 599, 608 (1993); *Regional Import & Export Trading Co.,* 318 NLRB 816, 820 (1995). This conclusion is apart from the one I reach that ECM, by failing to challenge the gross backpay calculations for Rothamel contained in the amended specification as unreasonable, or to propose an alternative, as it is required to do in its answer by Board Rule 102.56(b), if it wishes to litigate Rothamel's failure to seek interim employment at any time, is foreclosed from disputing the gross backpay formula or calculations as applied to Rothamel.

Turning now to the joint and several liability of AC/Boyce and ECM running from March 25 to May 1, 1996, contrary to the allegations appearing in the amended specification, I am unwilling to impose any contractually based obligations on these parties. While I have concluded that ECM is AC/Boyce's successor under *Golden State Bottling Co*., supra, it has no obligation to comply with, or to enforce the 8(f) agreement to which AC and Boyce were subject. Neither does AC/Boyce, following ECM's succession to the business, *Daniel Construction Co.,* supra. The underlying decision did not impose a bargainng obligation on AC; it only required AC to make whole the discriminatees. In doing so, it would be required to pay them backpay in accordance with the contract which the record showed it had adopted as a successor employer under *Golden State.* ECM has no such obligation. It did not adopt the union agrement, and it is not subject to remedying any breached bargaining obligations which were not imposed against its predcessor. Particularly given the fact that the agreement to which AC was subject was an 8(f) prehire agreement which, while binding for the entire term of the contract (and beyond, against AC/Boyce because of Roberts' failure to provide timely notice of termination), requires for conversion to a full 9(a) status, a Board certification or voluntary recognition based upon a clear showing of majority support, *Deklewa*, 282 NLRB at 1385 fn. 41, 1387 fn. 53, there is even less reason to impose its terms for the purpose of measuring the two discriminatees' backpay, upon ECM as a *Golden State s*uccessor. Even if it had an obligation arising under Section 8(a)(5), that obligation would require it normally to bargain in good faith with the Union selected by the employees of its predecessor, under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), but no such obligation was imposed against its predecesssor below.

Accordingly, I will require AC/Boyce and ECM, jointly and severally, to make whole the two discriminatees by paying to them the wages and benefits which ECM provided to its journeymen electricians during the backpay period. Inasmuch as those figures have not been calculated by the Regional Office of the Board, nor has the Region computed the quarterly totals, for the first and second quarters of 1996, I will recommend a remand of this portion of the proceeding to the Regional Regional Director for the necessary computations. See, e.g., *Teamsters Local 469 (Coastal Tank Lines)* 323 NLRB 210 (1997).

[Recommended Order omitted from publication.]